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Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~777~~ 57

GEORGE LEWIS DICKINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, George Lewis Dickinson, says that a writ of certiorari ought to issue to review the judgment of the court below. That court erroneously overruled important questions of law. The court also decided questions directly in conflict with decisions in other circuits by affirmance of the conviction.

Opinion Below

The opinion of the court of appeals [122-143][1] is not yet reported.

Jurisdiction

The judgment of affirmance was entered March 9, 1953. [144] On March 28, 1953, Mr. Justice Douglas extended the time for filing this petition to May 8, 1953. [146] This Court has jurisdiction under 28 U.S.C. 1254 (1).—See also Rules 37 (b) and 45 (a), Federal Rules of Criminal Procedure.

Questions Presented

I.

How Involved

Section 6 (g) of the Selective Service Act of 1948 provides that ministers of religion are exempt from training and service. Section 16 (g) (1), (2) and (3) of said act provides that a registrant who preaches as his customary vocation and teaches "the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect or organization" is a minister of religion, ordained or regular. Registrants excluded from the exemption in this section are those who do not preach as above required.

Dickinson showed, without dispute, that he had been ordained "in accordance with the ceremonial" established by Jehovah's witnesses as a minister and that he "as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of

[1] Numbers appearing herein within brackets refer to pages of the printed record in this case.

public worship" of Jehovah's witnesses, devoting all of his time except five hours per week to his vocation.

Question One

Whether there was basis in fact for the denial of the exemption as a minister of religion to Dickinson, found by the board to be devoting "his full time to the work of preaching" because (1) all of Jehovah's witnesses are ministers; (2) the ordination ceremony of Jehovah's witnesses is not orthodox or in accordance with the ceremony employed by other religions but is patterned after that of the Lord Jesus Christ; (3) there was no formal certificate of ordination in the file showing Dickinson to be recognized; (4) Dickinson "was not yet 21 years of age" at the time of claiming to be a minister of religion; and (5) Dickinson gave up, too late, his full-time night secular job as radio repairman (that did not interfere with his ministry), which was after he had been classified 1-A by the local board?

II.

How Involved

Section 1624.2 of the Selective Service Regulations provides that, following the personal appearance before the local board by the registrant, new and "further information" given orally to the local board "shall be summarized in writing" and "shall be placed in the registrant's file".

Dickinson appeared before the local board and gave extensive oral testimony about (1) his background and training for the ministry; (2) quitting his night secular job; (3) his appointment as presiding minister or "the overseer of a congregation of people in Coalinga, California"; (4) the certificate of appointment which he displayed to the local board members which certificate related to his being presiding minister and which was issued by the legal governing body of Jehovah's witnesses; (5) supporting himself by working five hours weekly as radio

repairman and through help received as a minister with no salary; and (6) the affidavit which he filed with the local board certifying that he was "in charge of the missionary work" of Jehovah's witnesses in a 5,400 square-mile area and that he was "devoting his full time to the work of preaching" as a pioneer minister since August 1, 1949.

The memorandum prepared by the local board showed that (1) he preached in a public building; (2) [falsely] he had not been ordained; (3) he devoted "his full time to the work of preaching"; (4) he supported himself through "this work"; and (5) he was a "Jehovah's witness".

The memorandum did not show (1) he had quit full-time secular work, record of which full-time occupation appeared in the file; (2) his background and education; (3) he had been formally ordained; (4) he was a presiding minister over a congregation; (5) he preached one hundred hours monthly in missionary work and devoted additionally fifty hours monthly to his work as presiding minister of the congregation; and (6) other material facts given orally to the local board at his personal appearance.

Question Two

Whether the failure of the local board to make the memorandum of the new and additional oral evidence deprived Dickinson of a full and fair hearing before the district appeal board when that board did not have before it and could not have had before it the letter written by Dickinson to the Director of Selective Service requesting an appeal to the president, which letter (written after the determination made by the district appeal board) contained some of the facts omitted by the local board in its memorandum?

Statutes and Regulations Involved

The indictment was returned pursuant to the provisions of Section 12 (a) of the Selective Service Act of 1948 (50 U. S. C. 462 (a), 62 Stat. 622). Section 6 (g) of the Selective Service Act of 1948 reads as follows:

> "Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title."—50 U. S. C. 456 (g), 62 Stat. 609.

Section 16 (g) (1), (2) and (3) reads as follows:

> "(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> "(2) The term 'regular minister of religion'

means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."—50 U. S. C. 466 (g) (1), (2) and (3), 62 Stat. 624.

Section 1622.19 of the Selective Service Regulations provides:

"1622.19 *Class IV-D: Minister of religion or divinity student.* (a) In Class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion;

"(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

"(4) Who is a student preparing for the ministry under the direction of a recognized church

or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled." —32 C. F. R. § 1622.19.

Section 1624.2 of the Selective Service Regulations reads as follows:

"1624.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).

"(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary." —32 C. F. R. § 1624.2.

Section 1627.1 of the Selective Service Regulations reads as follows:

> "1627.1 *Who may appeal to the President from any determination of an appeal board.* (a) When either the State Director of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.
>
> "(b) An appeal to the President may be taken by the Director of Selective Service (1) by mailing to the local board, through the State Director of Selective Service, a written notice of appeal or (2) by placing in the registrant's file a written notice of appeal and, through the State Director of Selective Service, advising the local board thereof."—32 C. F. R. § 1627.1.

Statement of the Case

The indictment charged Dickinson with a violation of Section 12 (a) of the Selective Service Act of 1948. (50 U. S. C. App. 462 (a)) It was alleged that after registration and final classification Dickinson was ordered to report for induction, that he reported for induction and "did on the 17th day of July, 1951, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Selective Service Act of 1948, and the rules and regulations made pursuant thereto." [4] Dickinson was arraigned. [5] He pleaded not guilty. [6] Trial by jury was waived and he consented to trial to the court. [7]

The case was called for trial on October 8, 1951. [22]

Evidence was received. [31-97] A motion for judgment of acquittal was made at the close of the evidence. [98-100] The motion was denied. [23, 100] Dickinson was found guilty. [23-24, 100] The court sentenced Dickinson to two years in the custody of the Attorney General. [24, 113] Judgment and commitment were entered in the court below. [25-26] Notice of appeal was duly and timely served. [27] Application was made for bail in the trial court pending appeal. It was denied. [113-114] On motion made to the court below bail was allowed pending appeal. [116]

The court of appeals affirmed the judgment of conviction. [144] It held that the failure to comply fully with the regulations requiring a summary of the oral evidence was harmless error. The court held that the denial of the ministerial exemption was not without basis in fact. It held the draft board order was valid. It declared that Dickinson was properly convicted for failing to submit to induction as ordered by the local board. [122-143] The indictment is based upon refusal of Dickinson to comply with the order to report for induction. He refused to submit as ordered. The order of the draft board is based on a I-A classification. The indictment, order and classification sprang from events that shall now be stated.

The Facts

Dickinson registered in the time and manner required by law with Local Board No. 37 of San Francisco County, located at 2038 Mission Street in San Francisco, September 15, 1948. [32-33] He filed his Classification Questionnaire in November 1948. [33-34] (Government's Exhibit 2) Statements appearing in Series VI of the form showed as follows: "(a) I am a minister of religion. (b) I do regularly serve as a minister. (c) I have been a minister of the Jehovah's witnesses since July 1, 1947. (d) I have not been formally ordained." Series VIII of the questionnaire stated "I am a minister and support myself by doing radio

work at night". Dickinson showed in Series VIII that he was employed in the San Francisco Naval Shipyard since June 29, 1948. The questionnaire showed that he devoted forty hours per week to this work as a repairman, earning $1.36 per hour. Series X of the questionnaire showed that he had completed six years elementary school, three years of junior high school and three years of high school. It appears that upon graduation he attended San Francisco City College and Samuel Gompers Trade School, where he was trained for radio engineering. At the end of the questionnaire he made a statement regarding his classification, stating that it was his opinion that he should be placed in "Class 4D".

No classification was given to Dickinson until July 31, 1950, when the local board placed him in Class I-A. [34] He acknowledged receipt of this classification of I-A, complained about it because it made him liable for training and service and requested a personal appearance before the local board. (Government's Exhibit 3) [34] On September 2, 1950, the local board notified Dickinson to appear before it on September 7, 1950, at 7:30 in the evening for a hearing. [35]

Dickinson appeared before the local board. When the hearing opened he informed the board that he was claiming exemption as a minister of religion. The chairman asked "What education have you had for the ministry?" [59] He informed the board that he had attended the Theocratic Ministry School of Jehovah's witnesses. [59] He reviewed extensively the course of study pursued by him in preparation for the ministry. [59-61] He informed the board that there had been an important change in his vocation. He explained that since the filing of his questionnaire in 1948 he had quit secular work as a radio repairman, been fully and officially ordained in April, 1949, and that he was at the date of the hearing and long prior thereto engaged in the full-time ministry as his vocation. [62-63] He informed the board that he quit working for the Navy Shipyard on

August 1, 1949. [93, 95] He also informed the board that he had been out of such secular work and engaged in the full-time missionary work for over a year before the date of his personal appearance. [95] He explained that he had changed his status from that of a regular minister to that of an ordained minister. [63]

Upon the personal appearance Dickinson told the board that he devoted one hundred hours per month to missionary evangelistic work, preaching to the people in their homes and publicly upon the streets. [64-65] He further informed the board that he had been transferred from San Francisco to Coalinga, California, where he acted as presiding minister of the congregation of Jehovah's witnesses. [65] He pointed out that it was his duty to preside weekly over the meetings of the congregation at the church meeting place of Jehovah's witnesses in Coalinga. [71] Upon the personal appearance Dickinson also testified that he supervised the missionary evangelistic work of other ministers of Jehovah's witnesses in the missionary field assigned to them by the Watchtower Bible and Tract Society. [72]

Dickinson pointed out to the local board that in addition to the one hundred hours devoted to door-to-door missionary work he spent fifty hours more per month in preaching from the pulpit at the church meeting place of Jehovah's witnesses and in preparation of sermons and otherwise carrying out his spiritual duties as presiding minister of the congregation. [73-76, 77, 90]

On the occasion of the personal appearance before the local board Dickinson pointed out that he did some part-time radio repair work of about five hours per week, averaging earnings of $35 per month to defray his cost of living. [73-74] He gave the local board a breakdown of his expenses and showed that he could live on $35 a month. When the board asked him to explain how it was that his vocation was that of the ministry when he received no pay from his preaching activity, he testified that he answered the board

as follows: "So I explained to him, suppose a person were financially fixed, suppose he were a millionaire and he refused a salary from the church, he would still be a minister and doing the work of a minister, that would still be his vocation. And also I told him about the Scripture parables of the Apostle Paul. I said to him how the Apostle Paul said, the Ninth Chapter of First Corinthians, said that he had authority to reap from the persons or the congregation their material things because he had sowed to them spiritual things. . . . So I explained to him that the Apostle Paul instead of burdening the congregation with his material cares, instead he told them that he would not want to burden them down, he would like to furnish them the good news without cost, and he made tents for his living." [75, 76]

Following the personal appearance the clerk of the local board made a very brief memorandum of the oral testimony given upon the occasion of the personal appearance. See Government's Exhibit 4, reading as follows:

"9/7/50

"Dickinson
"Public Bldg. where he preaches.
"Has not been ordained.
"Devotes his full time to the work of preaching.
"Supports himself through this work.
"Jehovah's witness." [36]

Upon the trial this exhibit was called to the attention of Dickinson. [79] He said that the statement in the memorandum that he had not been ordained was not true. [79] He said that the clerk probably got her idea that he was not ordained from the statements appearing in his questionnaire that was filed several months prior to his ordination, which was several months before his personal appearance. [79] He pointed out to the court that the memorandum did not contain any of the extensive oral evidence that he gave to the board about his ordination. [79-80] He

also pointed out that he gave extensive testimony upon his education and training for the ministry and that the memorandum made no mention of this testimony. [80, 83] Also he pointed out that the memorandum failed to disclose a summary of the extensive evidence that he gave to the board about the time that he devoted to his vocation which was the full-time ministry. [89-90] He complained that the written statement failed to show that he had quit working at the Navy Yard months before the personal appearance. [95] He said: "All they had was six lines on that personal hearing and that was hardly sufficient. It left out so many things." [83]

Upon the personal appearance Dickinson filed two written statements showing that he conducted home Bible studies with Mrs. Margaret Busterna and Mrs. Olga Egga, one on Tuesday and one on Thursday of each week. He also submitted an affidavit of C. David Easter, who stated that Dickinson was "officially in charge of our missionary work in a 5,400 square mile section of territory embracing parts of Fresno and Kings counties with headquarters in Coalinga, California, since January 3rd, 1950. Prior to his Coalinga, California appointment Mr. George L. Dickinson worked with me here in San Francisco devoting his full time to the ministry, being enrolled as a full-time pioneer minister by national headquarters as of August 1st, 1949, and continuing as such in good standing until the present time."—See Government's Exhibits 6 and 7.

On September 14, 1950, the local board reviewed the information submitted on September 7 and classified Dickinson in I-A making him liable for training and service. On September 15, 1950, notice of classification was mailed to him. [36] He was ordered to report for a physical examination resulting in his being declared acceptable. [38-39] On appeal to the board of appeal he was classified in Class I-A on February 19, 1951. [31-40] On February 28, 1951, he wrote a letter to Major General Lewis B. Hershey, Director of the Selective Service System, requesting that

he take an appeal from the appeal board determination to the National Selective Service Appeal Board in Washington. [41] On April 10, 1951, General Hershey appealed the case to the president, resulting in a review by the National Appeal Board. [42]

On June 5, 1951, the members of the National Selective Service Appeal Board unanimously classified Dickinson in Class I-A. [43] On July 2, 1951, Dickinson filed a conscientious objector form. [45-47] The memorandum in the file shows that the clerk was requested to ask him why he changed his mind regarding filing a conscientious objector form. At first he signed the request, then struck out his signature and later, after the final classification by the National Appeal Board, renewed his request. He explained the reason was due to his misunderstanding as to the meaning of the term conscientious objector. [86-87] The conscientious objector form was properly filled out and showed that he was one of Jehovah's witnesses with conscientious objections to combatant and noncombatant military service. A magazine of the organization was submitted along with the form showing that Jehovah's witnesses are conscientious objectors while not pacifists. [47, 50-51]

An order was issued for Dickinson to report for induction on July 2, 1951, commanding him to appear on July 16, 1951. On the day that the conscientious objector form was filed the local board issued the order to report for induction. [47] The board reviewed the file and considered the conscientious objector form on July 12. It refused to reopen the case and stay the order to report for induction. [51-52] On July 16, 1951, Dickinson reported for induction and thereafter, on the 17th of July, refused to be inducted into the armed forces. [52-54]

Reasons for Granting the Writ

Important questions of federal law are obviously involved. The undisputed evidence showed that petitioner is a minister of religion according to the definition contained in the act and regulations. The decision below conflicts directly with the holding in *Hull* v. *Stotter*, 151 F. 2d 633 (7th Cir.). Since the local board found that Dickinson's full time was devoted to preaching and his record showed that he performed no secular work as a vocation but only a small amount of part-time secular work incidental to his full-time ministry, there was no question of fact involved. The holding of the court below conflicts with *Dismuke* v. *United States*, 297 U. S. 167, 172-173:

> ". . . This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it. . . . The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895, to December 30, 1902, was an employee of the United States. The administrative determination of that question is open to review in the present suit, and should have been considered and decided by the court below."

On other holdings of the court below there is conflict with determinations of other courts of appeals. These conflicts, as well as the importance of the questions above presented, shall now be demonstrated.

I.

Whether the definition of the term "minister of religion" appearing in the act of Congress can be disregarded and alien immaterial factors imported into the law to defeat the purposes of Congress is a question of very great public importance.

There are hundreds of small religious organizations whose methods do not comport with the practices of the popular and large religious organizations. Thousands of ministers of religion preaching as their vocation are imperiled by the decision of the court below. The artificial standards adopted by the court below to determine whether there was basis in fact for the classification leaves without any relief every minister of religion who may be arbitrarily and capriciously denied his claim contrary to the act and regulations.

The decision of the court below nullifies completely the intention of this Court to grant "limited" judicial review in draft cases. The standards employed by the court below constitute an abdication of the judicial function in cases where ministers of religion, whose vocation appears to be the ministry, have been denied their proper classification.

It is imperative that this Court clarify the law as to what elements may be taken into consideration in determining whether there is basis in fact for the denial of the claim for exemption as a minister of religion. It is important to the nation that the intention of Congress be not subverted by a court holding that there is basis in fact for a classification because (1) "every member of Jehovah's Witnesses is a minister"; (2) the ordination ceremony of Jehovah's witnesses is not orthodox or in accordance with the ceremony employed by other religions but is patterned after that of the Lord Jesus Christ; (3) there was no formal certificate of ordination in the file showing Dickinson to be recognized; (4) Dickinson "was not yet 21 years of age" at the time of claiming to be a minister of religion; and (5) Dickinson gave up, too late, his full-time night secular job as radio repairman (that did not interfere with his ministry) which was after he had been classified I-A by the local board.

It is of wide interest and national importance to have this Court say whether the above and similar alien ele-

ments can be invoked by a court to approve an arbitrary and capricious denial by a draft board of a ministerial claim for exemption that is clearly within the intent of Congress.

It is of even greater public importance to have this Court correct a decision that has permitted discrimination of the sort condemned by this Court in *Niemotko* v. *Maryland*, 340 U. S. 268, 272 and *Fowler* v. *Rhode Island*, 348 U. S. 67, 69-70.

The first question presented involves holdings made by the court below that are directly in conflict with the holding of the Court of Appeals for the Seventh Circuit in *Hull* v. *Stalter*, 151 F. 2d 633. The holdings by the court below are not supported by the decision of this Court in *Cox* v. *United States*, 332 U. S. 442. The *Cox* case is not in point as will be shown hereafter.

Notwithstanding the discrimination here complained of it is important for this Court to clarify the law. This case, therefore, is important not only to Jehovah's witnesses but to all religious organizations and ministers whose rights under the act and regulations are imperiled by the decision of the court below on what may be taken into consideration in determining whether there is basis in fact for the denial of an exempt classification by a draft board.

The various holdings of the court below incidental to the first question stated above shall now be discussed. It will be shown that the holdings are not only erroneous but in conflict with other holdings. They emasculate the exemption under the act.

The court below said that Dickinson told the local board that "every member of Jehovah's Witnesses is a minister and entitled to exemption as such". [136] While there is evidence that he explained to the local board Jehovah's witnesses are a society of ministers and that only those who preached are Jehovah's witnesses, he did not tell the board that they were "entitled to exemption as such". [92] This statement that he said they were "entitled to exemp-

tion as such" is not supported by the record. Even had Dickinson told the board that all of Jehovah's witnesses are ministers and entitled to the exemption, that would not have justified a denial of the claim. The board was bound to consider the facts in his case. Otherwise his case could be won or lost according to what other of Jehovah's witnesses are. The exemption is individual. It is not a class exemption.

The view of the court below on this point is in conflict with that of the Court of Appeals for the Seventh Circuit that—

> "every registrant, whether he be Jehovah's witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification."—*Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.).

The court below did not attempt to determine whether Dickinson was exempt because his vocation and "work brings him within that classification". The court proceeded to disregard the undisputed evidence and consider the irrelevant and immaterial factor that all of Jehovah's witnesses may claim to be ministers. It had no bearing on whether there was basis in fact for the classification.

It is submitted that there is no pigeonhole in the law to place missionaries of a religious organization that takes the stand all of its missionaries are ministers. It is, however, definite that Congress intended to exempt each individual who brought himself within the definition.

The *non sequitur* type of reasoning emphasized by the court below on this point contravenes the holding of the

Court of Appeals for the Sixth Circuit in *Niznik* v. *United States*, 184 F. 2d 972. That court condemned a denial to two of Jehovah's witnesses of the ministerial exemption that was based upon the fact that they were members of Jehovah's witnesses. That court said:

> "Disregard of this provision [concerning classification of ministers], and refusal to classify as a minister of religion solely on the ground that appellants were members of a religious sect and that they had not attended a religious seminary and had been regularly ordained, was arbitrary and contrary to the law and regulations."—184 F. 2d 972.

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on an important question of law that ought to be determined by this Court. The holding of the court below on this point also is in conflict with the two decisions above quoted from. This holding should, therefore, warrant the granting of the writ of certiorari.

The court below made another holding on a very important matter. The court said that Jehovah's witnesses put a special meaning on "ordination". This statement is unsupported by the record.

Dickinson merely described to the local board that the ordination ceremony was that of baptism. He said it was the organizational method of Jehovah's witnesses to give one so ordained "his commission or ordination—the words are synonymous—to go forth and preach to others and teach the things that He Himself cherishes so much". [63] He stated that he testified at the local board hearing that he was "ordained by baptism". [64]

It is apparent from a reading of the record that there was no special meaning placed on the word "ordination" by Dickinson or Jehovah's witnesses.

The court below placed a special meaning on the term

without saying what it meant. The court below criticized the "ordination" of Dickinson and Jehovah's witnesses without giving any basis for the criticism. The court rejected the testimony of Dickinson concerning his ordination. The court then assumed an unreasonable attitude of acting as a religious hierarchy instead of a judicial body.

It was for Jehovah's witnesses and Dickinson to justify the method of ordination which was acceptable and satisfactory to them. This principle of law is well known. Recently, in reversing the conviction of one of Jehovah's witnesses, in *Fowler* v. *Rhode Island*, 348 U. S. 67, this Court said:

> "... Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. ... To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. That would be precisely the effect here if we affirmed this conviction in the face of the concession made during oral argument. Baptist, Methodist, Presbyterian, or Episcopal ministers, Catholic priests, Moslem mullahs, Buddhist monks could all preach to their congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function."—348 U. S., at pages 69-70.

What the court below did was to lay the hand of the marshal and prison keeper "on the shoulder of a minister of this unpopular group" because his ordination ceremony was not in accordance with the religious views of the judges who heard the case.

The holding of the court below on this point is in conflict with history and the democratic attitude of the courts of this land to let religion run its own business without meddling on the part of the judiciary. The spirit demonstrated by the court below is contrary to that of the Director of Selective Service, who declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups, "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme."—*Selective Service in Wartime*, Second Report of the Director of Selective Service, 1941-42, p. 240, Government Printing Office, 1943.

The word "ordain" means "to establish by appointment", "to appoint or establish."—Webster's *New International Dictionary;* Funk & Wagnalls *Practical Standard Dictionary.*

The Encyclopedia Americana (1942 Ed., Vol. 20, p. 770) defines ordination as "The ceremony by which priests, deacons, subdeacons, candidates for the minor orders and ministers of any denomination are admitted to their specific office in the church".—See also *The Encyclopædia Britannica* (11th Ed., Vol. 28, p. 527 *et seq.*).

The Cyclopædia of Biblical, Theological and Ecclesiastical Literature defines ordination as "the ceremony by which an individual is set apart to an order or office of the Christian ministry. . . . In a broader, and in fact its only important sense, . . . the appointment or designation of a person to a ministerial office, whether with or without attendant ceremonies".—Vol. VII, p. 411, McClintock and Strong, New York, Harper & Brothers, 1883.

The approach of the court below to the ordination of Dickinson made a distinction between orthodox and unorthodox religions. This was contrary to the general prin-

ciple of law that the judiciary places orthodox, heterodox, pagan, Christian, or Jewish religions on the same level before the bench. It has been said that the law regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights". (*Donahue* v. *Richards*, 38 Me. 379, 409. Cf. *People* v. *Board of Education*, 245 Ill. 334, 349; *Grimes* v. *Harmon*, 35 Ind. 198, 211) "So far as religion is concerned the laissez faire theory of government has been given the widest possible scope."—*Freeman* v. *Scheve*, 65 Neb. 853, 878, 93 N. W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of land granted by Congress in 1778 for "religious purposes". (*State* v. *Trustees of Township*, 2 Ohio 108; *State* v. *Trustees*, Wright 506 (Ohio)) It was held that the doctrine was contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion.—*Harrison* v. *Brophy*, 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington*, 1 Watts 219, 225; 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society*, 6 N. Y. Super. Ct. (4 Sandf.) 156, 181.

The submission to the ordination ceremony of public immersion in water brands Dickinson. It marks him as a person who dedicated his life to the service of Jehovah God as a minister, bound to preach the gospel of God's kingdom as long as he lives prior to Armageddon. His ordination implies the acceptance of the obligations which it imposes. A complete, unbreakable agreement on the part of the minister thus ordained, to follow in the footsteps of Christ Jesus, is entered into. The one ordained cannot turn aside from his covenant to preach, for any reason. The covenant requires faithful preaching, even to the point of death. An ordained minister of Jehovah God cannot turn back without violating his covenant. The turning back from

preaching would result in his everlasting death, because God declares that covenant-breakers are worthy of death. —Acts 3:23; Romans 1:31, 32.

The ordination of Jehovah's witnesses emanates from the Most High God "whose name alone is JEHOVAH". (Psalm 83:18; Isaiah 61:1-3) He is the source of all power and authority and the One who authorizes ordination of His ministers. The ceremony used by Jehovah's witnesses to establish by public witness the ordination of a minister is identical with the ceremony that Christ Jesus underwent after he was ordained. A very simple ceremony marked the beginning of his ministry. He symbolized his dedication by undergoing the ceremony of water baptism in the River Jordan. (Matthew 3:13-17) It is this same simple ceremony that every one of Jehovah's witnesses goes through as a public symbolizing of his dedication to preach and of his ordination.

Notwithstanding that the ordination ceremony fits the pattern made by Jesus Christ, the court below ridiculed it by saying: "Such an exposition of what constitutes an ordained minister of religion could call for nothing but skepticism." [138] As individuals the judges in the court below are entitled to their own ideas about what is an ordained minister of religion. Their orthodox views, however, would reject the ordination of the Lord Jesus Christ who went through the very same ceremony as did Dickinson in this case. Surely Congress did not intend to authorize either the courts or the draft boards to amend the law and repeal it as has been done here.

The court below said that "the board was justified in refusing to accept his claim that he was an 'ordained' minister of religion, as it was made clear to them that appellant did not use that term in its ordinary sense". [140] The local board found that Dickinson had "not been ordained". [79, 124] Dickinson explained that this conclusion was reached in the board's memorandum through error of the board

in referring back to his questionnaire. In his questionnaire filed in November 1948 he stated that he had not been "formally ordained". [33-34] He was formally ordained after he filed the questionnaire in April of 1949. [62-63] His ordination, after filing the questionnaire and before the personal appearance, was fully explained to the local board. [57, 63, 79] Yet in spite of this undisputed testimony the local board, like the court below, reached the conclusion that he was not ordained. [79, 124]

Either the local board made a plain mistake of fact by forgetting what Dickinson told them or it completely disregarded his evidence of a change of his status and made a determination based alone on what had been stated in the questionnaire. This type of a draft board determination was held to be an arbitrary and capricious one in *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.).

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on an important question of law that ought to be determined by this Court. The holding of the court below on this point also is in conflict with the decision in the *Hull* case. This holding should therefore warrant the granting of the writ of certiorari.

The court below erroneously invoked the doctrine that Dickinson relied on weaker evidence when he could have furnished stronger and more satisfactory proof. The court said:

> "It must have seemed strange to the local board that the only documentary evidence of appellant's capacity as a minister which he brought forward was the affidavit of C. David Easter who described himself as a duly ordained minister working in a certain section of San Francisco." [138]

To begin with, the local board at no time questioned the authenticity of the documentary evidence submitted. There was no contention made at any time, anywhere, until

the court below pulled the rabbit out of the hat by saying that it "must have seemed strange to the local board". The local board did not say that it seemed strange. It found that he was a "Jehovah's witness". [124]

When Dickinson was before the local board he handed up a letter from the Watchtower Bible and Tract Society, Inc., the legal governing body of Jehovah's witnesses, stating that he was a full-time pioneer minister and explaining his duties. [66] (See Defendant's Exhibit C for identification.) He also showed the board a letter from the legal governing body assigning him to act as supervising minister and overseer for the Coalinga Congregation of Jehovah's witnesses. [66-67]—See Defendant's Exhibit D for identification.

At the personal appearance these documents were shown to the board. The chairman read the letters and Dickinson also explained the contents of them. [67-68] He offered the documents for inspection only because he "had no copies". [68] The chairman read very carefully the letters from the said Society appointing Dickinson as the minister of the Coalinga Congregation. [68-69] Dickinson testified that the chairman "seemed to acknowledge that as the fact" and it appeared that "he was satisfied". [69] Dickinson said that there was no objection to the weight of the letters and no contest of their truthfulness by the board. [69] The exhibits were excluded from the record. [69-70]

The court below described these exhibits in footnote 8 of the opinion and then proceeded to do what the draft board did not do, question the authenticity of the letters. [138-139] The court then put words into the mouth of the draft board, contrary to the evidence, and said that an "interesting inquiry for the board was why did not this governing body come forward with a credible certificate as to appellant's standing as a minister?" [138-139] If the draft board was satisfied with the evidence submitted

to it, what right did the court below have to say that this was not satisfactory to the draft board?

The court below then makes reference to the fact that there was a list of ministers of Jehovah's witnesses filed with the National Headquarters of Selective Service System under the 1940 act. The list died with the 1940 act. Reference to the defunct list by the court below was a flagrant mistake of fact. Reliance upon the absence of Dickinson's name from the nonexistent list is arbitrary and capricious. Even under the 1940 act, when the certified list was referred to in another case, the ground relied on by the court below was rejected. In *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.), the court said:

> " . . . The fact that his name was not included as a minister of Jehovah's Witnesses at National Headquarters of the Selective Service is of little or no consequence under the facts of the case. While it perhaps was a circumstance to be considered by the Board, it constituted no proof as to relator's actual status. Furthermore, the practice of placing names upon this list was discontinued by the National Director of Selective Service on November 2, 1942 (relator was finally classified February 3, 1943)."

The statement made by the court below, "we cannot assume that if this applicant was what he claimed to be he could not secure from the appropriate head or heads of his sect or organization similar evidence of his standing," [138] therefore, is meaningless. The "similar evidence" referred to by the court was the list. How could there be a requirement by the court that a list be filed when the draft board did not insist on this? If the draft board had been dissatisfied with the documentary proof submitted, it would have said something about it. The uncontradicted evidence, however, is that there was no objection raised by the

draft board; the board approved the form of the document submitted. Since the draft board did not question the authenticity of the document submitted, it was beyond the competency of the court to do so.

It is submitted that the proof given by Dickinson to the board showed that he was "recognized by such church, sect, or organization as a regular minister". The court below confuses the two sections of the act in order to sustain its objection to the documents offered by Dickinson. In footnote 10, Section 16 (g) (2) is quoted. This section refers to the definition of a "regular minister of religion". [139-140]

The court in footnote 7 [137] refers to the definition of the term "duly ordained minister of religion". This definition does not have in it the term "who is recognized" by his organization. "Ordained" for the ordained minister means the same as "recognized" for the regular minister. Why the court would seize upon this phrase of the definition of a regular minister and use it to back up its challenge to the documents submitted by Dickinson to the board is difficult to understand. The court did not explain why it resorted to this practice.

The statement in the court's opinion that the board was justified in being dissatisfied with the character of the showing which Dickinson undertook to make [139-140] is entirely without justification. It has no place in this case and ought not to be relied on by this Court.

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on an important question of law that ought to be determined by this Court. This holding should therefore warrant the granting of the writ of certiorari.

Another ground is relied on by the court below which is arbitrary and capricious. It is that the local board had the right to "look at the registrant and to observe his manner, his appearance, and his demeanor". [140] The court then

says that appearing before the board was a man who at the age of 19 said he was a full-time ordained minister of religion! Then the court says: "We cannot say that his looks and manner were not such as to emphasize this immaturity and the suggestion of absurdity in this claim." [140]

Why the court below conjures up this basis for objection on the part of the board is more than one can understand. Even the draft board itself did not make any point over the youthfulness of Dickinson. (See the memorandum of the hearing.) [36, 79, 124] When Dickinson was before the local board no question was raised as to his youthfulness. [57-73] Apparently the local board on this point used common sense.

The board must have known that if a man was old enough and competent enough to be a soldier he was old enough to be a minister. Perhaps also the local board was familiar with the historical record of ministers. The history concerning the popes, archbishops and bishops of the Catholic Church and the clergymen of the orthodox Protestant denominations reflects that many ministers began their ministry at the age of 12 and upward. Recently *Life* magazine carried an article entitled: "A 17-Year Old Minister." It appears in the March 9, 1953, issue. The article reads:

> "Lasserre Bradley Jr., who had always felt that he had a calling to be a minister, preached his first sermon at the age of 13 in a small Baptist Church near his home in Lexington, Ky. The congregation was amazed and delighted by the sermon, which was entitled 'Prepare to Meet Thy God.' At 15 Lasserre organized a congregation in a backwoods community in Kentucky, and the next year his congregation asked Lasserre's home church to ordain their young leader. He was brought before a panel of some 20 ministers who, knowing that their action might be held up to

ridicule, made their questions harder than usual. Lasserre had never studied theology formally but he answered questions about the Bible and Baptist doctrine without a flaw and was promptly ordained.

"Today, the Rev. Mr. Bradley, only 17 and still in high school, is pastor of the large New Testament Baptist church in Cincinnati. He drives there each weekend to preach, baptize and conduct funerals and weddings. On Friday afternoon, after finishing school, Lasserre jumps into a car given him by an auto dealer and drives 97 miles to Cincinnati. Over the weekend he eats and sleeps in the homes of members of his congregation, getting up early Monday to be back home in time for school. His congregation, an independent Baptist group, was hesitant at first about taking on so young a minister. But under his leadership membership has jumped from 480 to 530, and the congregation, which used to rent quarters, has completed negotiations for buying an old theater for $110,000 to be its church. Lasserre, who graduates from high school in June, plans to continue as pastor while going to college."—*Life* magazine, March 9, 1953, pp. 119-122.

Preaching at an early age is not unusual to followers of Christ. (Deuteronomy 6:4-7; Ephesians 6:1-4; Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19) The ministry is not confined to adult persons or to the aged. Youths not only are permitted to preach, but are invited to do so. (Joel 2:28, 29; Psalm 148:12, 13) Ancient outstanding examples are Samuel, Jeremiah and Timothy, whose faithfulness as Jehovah's witnesses in very early youth is proof that it is proper for young men to act as ministers. (1 Samuel 1:24; 2:11; 3:1; Jeremiah 1:4-7) Paul the apostle declares that he sent Timothy forth as a minister. (1 Corin-

thians 4:17) Timothy was instructed by Paul to let none despise his youthfulness.—1 Timothy 4:12.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God."—Luke 18:16. See also Matthew 18:1-6; Psalm 148:12-13; Proverbs 8:32.

The holding of the court below that a draft board can reject the claim of a minister because of his youthfulness is arbitrary and capricious. It is a very important ruling that cuts the ground out from under history itself. It nullifies completely the intent of Congress. Surely if Congress wanted to place an age limit on ministers of religion it would have said so. If the president desired to make youthfulness an element of disqualification he could have very easily done so in the regulations. Since neither the act nor the regulations provide for the forfeiture of the exemption because of youthfulness, it is beyond the authority of the courts to so amend the act and regulations. The judges cannot read into the act this alien doctrine. This holding is therefore an important holding that is of nation-wide interest. The welfare of the people of the nation is injured by this decision if ministers can be so discriminated against because of youthfulness.

If youthfulness was an element Congress would have made no provision for the ministerial exemption. The age limit of the draft law is from 18 to 26. If a young man is not qualified to be a minister, then Congress did not know what it was doing when it provided for the ministerial exemption of men as young as 18 and not older than 26. The very fact that there is duty imposed on a man of 18 under the act carries with it the correlative right of an exemption to a man of 18. It is ridiculous for the court below to base its decision on this tenuous ground. It is against the public

welfare and the history of religion. This is exacerbated when the local board did not raise this issue.

Since this point was grafted on to the case by the court below because of the personal appearance of Dickinson before the board, it is important to call to the Court's attention how immaterial it is. The board's holding is superseded by the decision of the National Selective Service Appeal Board. This was the holding of the court below: "Such, we think, must be said of the action of the National Selective Service Appeal Board in this case." [132]

Since the decision of the local board is completely obliterated by the decision of the National Selective Service Appeal Board (and it is the classification by that board that is here challenged), it was entirely immaterial for the court below to refer to the power of observation on personal appearance. The local board took no objection to his youthful appearance and immature demeanor. The court below was the first to inject this into the case when it read between the lines. Inasmuch as the National Appeal Board considered only the record and not Dickinson's "appearance, and his demeanor" [140] this particular ground stated by the court below as basis in fact is itself without basis in fact. It should be rejected for that reason.

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on an important question of law that ought to be determined by this Court. This holding should therefore warrant the granting of the writ of certiorari.

The court below strongly relied on the fact that when Dickinson filed his questionnaire he was "regularly employed at the navy yard". [141] It said that the local board knew that, after Dickinson had been classified I-A, "he stated that he had given up his job with the navy and had become a full-time minister of religion." [141] The court then said that this would require a determination by the board on whether such "changes of circumstances . . . were

real or feigned merely to improve his chances of proving his claim". [141] The court, in support of this holding, refers to a statement by this Court in the case of *Cox* v. *United States*, 332 U. S. 442, at page 451, about the claim for conscientious objector classification after reclassification of I-A.—See footnote 11 of the opinion of the court below. [141]

There is no analogy between the quotation in the *Cox* case and the facts here. To begin with, this is another objection relied on by the court below which apparently was not raised by the local board. The local board found as a fact at the time of the personal appearance that it considered Dickinson to be devoting "his full time to the work of preaching". [124] The chairman of the board at the time made a statement that recognized this change of status made no adverse comment at the hearing. [62-93]

The court below recognized the fact that the board gave no weight to his quitting secular work by quoting in its opinion the finding of the board that Dickinson devoted "his full time to the work of preaching" at the time of the hearing. [124] The court below would suggest to this Court, however, that the board questioned the integrity of Dickinson. If the local board had given any significance to his quitting "his job with the navy", it would have said something about it in the memorandum or summary made by the board. [124] The court below stated that the summary covered all the facts considered by the board to be important and material at the personal appearance. [130-131]

The holding of the court below on this phase of the case conflicts directly with the holding in *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.) There the Government made the same contention raised by the court below. It argued that the draft board could classify a man according to his status at the time of filing his questionnaire rather than at the time of final classification. The Government assailed a statement in the opinion of the trial court as being erroneous. It con-

tended in the appellate court that it made no concession in the trial court and that the trial court's holding was erroneous. The United States Court of Appeals for the Seventh Circuit said:

> "Moreover, we also have read the regulations and are of the view that this purported concession on the part of the Government was correct. We see no reason why a registrant with a nonexempt status at the time registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be nonexempt. In fact, the latter situation seems to be contemplated by § 5 (h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist'. The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

The court below asks an insinuative question for the draft board: "If he left the navy, was he still working as a radio repairman, and fully supporting himself thereby?"

[141] The answer to this question of the court below is the memorandum prepared by the local board stating that he devoted his "full time to the work of preaching". [124] The board added that he supported himself "through this work". [124] Dickinson testified that he earned $35.00 a month doing part-time radio repair work for five hours per week. From this he paid his bills. [74-75]

The court below could have taken judicial notice of the fact that many poor preachers who support themselves are aided by the congregation that they serve. Members of the congregation frequently give poor preachers meals, donate clothing to them, etc. The needs of the minister are often taken care of in order to see that he is able to continue in the Lord's work. The apostle Paul said: "The workman is worthy of his wages." (1 Timothy 5:18, *New World Translation*) As Jesus indicated, if God can provide for the birds of heaven he can also support his ministers by gifts.—Matthew 6:25-26; Luke 12:22-24; see also Exodus 16:4; 1 Kings 17:6.

Apparently the local board took judicial notice of the congregational practice of supporting ministers through gifts when it said that Dickinson supported "himself through this work". [124] The part-time secular work took care of his necessities. Anything additional required apparently came to him "through this work".

There are a large number of clergymen and ministers of Protestant and Jewish denominations who depend for their support upon secular work. In the Northern Baptist Convention twenty per cent of all clergymen in rural sections "help earn their keep by work not connected with their churches". (Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention* (1945), Judson Press, Philadelphia, p. 72.) In the Southern Baptist Convention the percentage is much higher.

Twenty-four per cent of all Protestant clergymen in the United States in 1939 received less than $600 annual salary

from their respective churches, of which fourteen per cent received less than $99 annually. "There is nothing to indicate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." —Landis, *Yearbook of American Churches* 1945, Federal Council of Churches of Christ in America, Sowers Printing Co., Lebanon, Pa., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons), Mennonites, and many others are dependent entirely upon secular work for their support, no salary being paid to their ministers as a general rule.

Pioneer ministers of Jehovah's witnesses (such as Dickinson) who support themselves by part-time secular work actually devote as much time to preaching and the duties of the ministry as do the orthodox clergymen who have congregations wealthy enough to support them without performance of secular work. They spend a minimum of one hundred hours monthly in house-to-house missionary work and much more time preaching before the congregation, studying, attending special meetings and performing congregational duties. The orthodox church-sustained clergy do not spend any more time in their preaching activities yet they do not sustain themselves by secular work as does appellant.

Throughout history of religious organizations ministers have been distinguished from church-sustained clergy. The self-supporting ministers contributed much more than the orthodox clergy to the spread of religion along with the pioneers in the days of expansion to the west.

> ". . . about the anniversary meetings, . . . a brief, summary view. . . . About two hundred of God's ministers were in attendance, all told—for *all* are ministers, servants of God's word; in which

all are recognized as *priests*—of the royal priesthood . . . The general sentiment . . . was, that they would be all the more diligent hereafter to pass the pleasant bread of truth to the hungering sheep of the Lord."—*Watch Tower*, April 1890, Vol. XI, No. 5, p. 1.

"The church has always been more successful in winning kingdoms for her Christ, when she has adopted just this lay preaching method. . . . The whole church a royal priesthood, and so the whole church a preaching church, that is the New Testament ideal."—*Lay Preaching* (Secretary's Annual Report), Hoyt, American Baptist Publication Society, 1869, New York, p. 21.

The only way the preaching job could be successfully done in the pioneer days was said to be "by the preaching and teaching, under Episcopal direction, by laymen deriving their support from their own secular labors".—*The Missouri Valley and Lay Preaching*, Wharton, 1859, New York, p. 18.

"Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4:10, 11) . . . From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubtless, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchial

> spirit which became developed at a later period. . . . In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. . . . The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century."—*Cyclopædia of Biblical, Theological, and Ecclesiastical Literature*, McClintock and Strong, Vol. 5, pp. 296, 297, New York, Harper & Bros., 1882.

The local board placed no reliance upon his performance of secular work. It is difficult to understand why the court below would attempt to inject this issue into the case when it was not the basis for the denial of the claim by the local board.

The fact that Dickinson may perform secular work in no way interferes with or prevents his performing his duties as a minister of religion. The source of financial revenue of persons excused by the act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.

The fact that a judge of a court may reside on a farm or ranch and operate it during his term of office in no way affects the statutory deferment as long as he fills the office of a judge. The fact that a governor of a state may own and operate some commercial business in no way weakens his claim for deferment under the act. That a wealthy clergyman may devote all of his spare time to caring for investments in securities, real estate and other enterprises in no way deprives him of his right to claim exemption under the act as long as he is recognized by his organization as a minister of religion and teaches and preaches regularly

the doctrines and principles of a recognized religious organization.

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the act such action cannot be supported solely by a finding that such person had other activities on the side that would not, within themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work although he may regularly and customarily teach and preach the doctrines and principles of his church as a minister. "Upon this point a page of history is worth a volume of logic."—Mr. Justice Holmes, *N. Y. Trust Company* v. *Eisner*, 256 U. S. 345, 349.

The performance of secular work or dependence upon income from activity other than the ministry is not mentioned in the statute or regulations, as far as the minister is concerned. Also nothing is said in the act or regulations about the amount of time that a regular minister should devote to his work. Nothing is said in the act which would require that judges have no extrajudicial activity. Nothing is said in the act that judges are precluded from earning money from sources other than their positions on the bench.

A construction placed upon the act which denies a minister the right to exemption because he performs secular work in addition to regular performance of duties as a minister would, by force of the same reason, also require that a judge be denied the exemption because he did some extrajudicial work in addition to his duties as a judge.

The liberal construction placed upon the act so as not to confine exemption solely to the orthodox clergy is demonstrated by the fact that officers of the Salvation Army, Lay Brothers of the Catholic Church, the practitioners, readers and lecturers of Christian Science in the Church of Christ Scientist, cantors in the Jewish congregation, counselors of the Mormon Church, and colporteurs of the Seventh-day Adventist Church were all declared by General Hershey to be exempt under the Selective Training and Service Act of 1940.

It should be remembered that Christ Jesus' apostle Paul, the foremost spokesman of the early Christian church, worked regularly at making tents. He chose to support himself by secular work rather than to be a charge and burden upon the poor people to whom he ministered publicly and from house to house. [75, 76]

To construe the act and regulations so as to exclude ministers who are forced, or who, as Paul, deliberately choose, to resort to secular work a few hours each week to sustain themselves in the ministry and thus to enable themselves to minister gratuitously to the poor and needy and themselves "be dependent on nobody", is to impute to Congress the intention of limiting the benefit of the exemption to the big-town and city ministers. So to construe the act results in the inequality which Congress ever seeks to avoid. So to construe brings only the un-American result of excluding from 'equal protection of the law' those ministers of small towns and rural communities of the country who are either unable or unwilling to enjoy wealth that enables big-town and city ministers to escape the need to labor to

support themselves and their dependents. Surely Congress intended to provide the benefits of exemption for ministers who chose to answer the call of opulent congregations in the metropolis and in small-town parishes equally. Seen in true perspective, the act's generous provision for exemption of ministers within the Congressional intent contrasts strikingly with an interpretation which would deprive such ministers of the exemption.

In absence of express provision in the act and regulations excluding from the shield of the exemption ministers regularly or customarily preaching who support themselves by their own labor at secular jobs, it must be assumed that Congress intended to include those as well as the ministers able to enjoy benefits of his parishioners' wealth so as to excuse him from need to toil for his own livelihood during the week. Even the National Headquarters of the Selective Service System recognized that ministers of many denominations are required to perform secular work in order to sustain themselves while engaged in the ministry.—State Director Advice 213-B, Part III, par. 3.

Cox v. *United States*, 157 F. 2d 787 (decided by the court below) affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, and *Martin* v. *United States*, 190 F. 2d 775 (4th Cir.), do not apply here. The reason is that in each of those cases the appellant devoted a large and substantial part of his time to performance of secular work at the time of final classification. In this case the evidence shows that Dickinson relinquished his full-time secular job and that the minor, incidental hours per week devoted to secular work did not in any way prevent him from full and complete performance of his duties as a minister. The evidence showed without dispute that he pursued the ministerial work as his vocation and that he did not perform the ministry incidentally as did the appellants in the *Cox* and *Martin* cases. The facts in this case are brought squarely within the rule announced by the court in *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.). In that

case the registrant was a full-time pioneer minister for the Watchtower Bible and Tract Society, which is the same as the petitioner in this case. The rule applied in the *Hull* case ought to apply here. The language of the court is appropriate. In that case, involving an arbitrary classification of one of Jehovah's witnesses on facts similar to the facts in this case, the court said:

> "Much is said in the briefs both complimentary and derogatory to Jehovah's Witnesses. With this argument we are not concerned. Whatever a draft board or a court, or anybody else for that matter, may think of them is of little consequence. The fact is, they have been recognized by the Selective Service System as a religious organization and are entitled to the same treatment as the members of any other religious organization. We do not agree with relator's argument that all members of the organization are ministers and exempt from military service. Neither do we agree with the Government's argument that the activities and doings of all the members of the organization may be taken into consideration in determining whether a particular member is entitled to exemption.
> . . .
>
> "A study of this record leaves no room for doubt but that relator, at the time of his final classification and for many months prior thereto, was a full-time minister within the meaning of the regulation and this pronouncement of the Selective Service System.
>
> " . . . We have serious doubt that there was any justification for the Board's refusal originally to classify relator in 4-D. Whatever be thought, however, of the Board's original action in this respect, there can be no question but that subse-

quent proof conclusively demonstrated that he was entitled to such classification.

"Such being the situation, the Board abused its discretion in its refusal to so classify him. Its action was arbitrary and unauthorized."

Cox v. *United States*, 332 U. S. 442, is, as before stated, not determinative. Even if it were, it is not sound. If it is found to be in point, then this Court is here requested to reconsider it and overrule it.

The case was decided by a divided court, five to four. No opinion was joined in by a majority of the Court. Mr. Justice Frankfurter merely concurred in the result. He did not agree with the four justices who wrote an opinion and with whom he agreed in affirming the judgment of conviction. Even the opinion of the four justices who decided against the reversal of the case and in favor of affirmance does not control here. In the *Cox* case the four justices found that the defendants "spent only a small portion of their time in religious activities". Here the facts show that Dickinson devotes much more time to his ministry than he devotes to his secular work. Also the record shows that he devotes as much time to the performance of his ministry work as do the orthodox clergy.

The opinion of the four justices in favor of affirmance in the *Cox* case was also based on the fact that there was no "definite evidence of his full devotion of his available time to religious leadership" in each case. In this case we have more than was available in the *Cox* case. In the *Cox* case it was said that the evidence was submitted by each petitioner and that there was not adequate supporting documentary evidence of their ministerial status. In this case there was shown to the local board a certificate issued to Dickinson by the Watchtower Bible and Tract Society, Inc., the legal governing body of Jehovah's witnesses, certifying that he had been engaged as a full-time minister since August 1, 1949.

The evidence submitted to the board by Dickinson was not discredited or impeached by the local board or the Government in the court below, even though the court below endeavored to make light of it. [138] The documentary evidence was accepted as true by the local board and the only bases for the denial of the IV-D classification were the arbitrary and capricious grounds stated by the board upon Dickinson's personal appearance, September 7, 1950. In the *Cox* case there was an issue of fact before the local board. In the case at bar there is no issue of fact and the fact situation is drawn clearly within that involved in *Niznik* v. *United States*, 184 F. 2d 972 (6th Cir.). There is, moreover, no basis in fact for the determination and the rule stated in *Estep* v. *United States*, 327 U. S. 114, about no basis in fact applies. The attention of the Court is drawn to the opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, in *Cox* v. *United States*, 332 U. S. 442, where it was said:

> "It is not disputed that Jehovah's witnesses constitute a religious sect or organization. We have, moreover, recognized that its door-to-door evangelism is as much religious activity as 'worship in the churches and preaching from the pulpits'. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109. The Selective Service files of these petitioners establish, I think, their status as ministers . . .
>
> "To deny these claimants their statutory exemption is to disregard these facts or to adopt a definition of minister which contracts the classification by Congress.
>
> " . . . It is not uncommon for ordained ministers of more orthodox religions to work a full day in secular occupations, especially in rural communities. They are nonetheless ministers. Their status is determined not by the hours devoted to their parish but by their position as

> teachers of their faith. It should be no different when a religious organization such as Jehovah's witnesses has part-time ministers. Financial needs may require that they devote a substantial portion of their time to lay occupations."

The attention of the Court is called also to the opinion of Mr. Justice Murphy in the *Cox* case, where he said:

> "It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers. And the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of more convincing evidence, I cannot agree that the draft board classification underlying petitioners' convictions are valid."

The decision in *Cox* v. *United States*, 332 U. S. 442, and the decision in *Goff* v. *United States*, 135 F. 2d 610 (4th Cir.), have been made inapplicable by reason of the explicit Congressional definition of a minister in Section 16 of the Selective Service Act of 1948.

It is plain that the vocation and calling of Dickinson —like many orthodox clergy who perform incidental secular work—is his ministry, rather than the inconsequential in-

cidental work he performs. This was his status on the occasion of his hearing before the local board. He cannot be denied his ministerial classification because he did not become a full-time minister until August 1, 1949. The holding below conflicts directly with the holding in *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.).

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on an important question of law that ought to be determined by this Court. The holding of the court below on this point also conflicts with the decision in the case of *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir.). This holding should therefore warrant the granting of the writ of certiorari.

The court below retreats to its last place of refuge in defense of the assault made by Dickinson against the draft board holding. It said that the draft board must not "give complete credence to all of the claims of such a registrant. The board had the same right to evaluate the testimony of a witness before it as has a trial court". [142]

This statement of law is academically correct. It has, however, no application here. There is not one iota of evidence in the record to indicate that the draft board may have disbelieved the documentary evidence submitted by Dickinson. The contrary appears. It seems that the draft board accepted every word Dickinson said as true. It merely demurred to the evidence offered by him. It drew a different legal conclusion from the undisputed evidence.

Since the local board did not question the documentary evidence or invoke the powers talked about by the court below [142], it was out of place for the court to import that rule of law into the case.

The court below speculated on what the draft board may have done or could have done and disregarded the record that was before it in order to side-step the question of whether there was no basis in fact for the classification.

There is no basis in fact for the classification here because there are no facts which contradict the documentary proof submitted by Dickinson. The facts established show that he is a minister and the classification given is therefore beyond the jurisdiction of the boards.

Congress did not intend to confer upon the draft boards arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the ministerial status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a minister, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion and that the classification is arbitrary and capricious.

It is submitted that such is the case here. The undisputed evidence shows that Dickinson is a minister entitled to Class IV-D. The denial of the classification is without basis in fact. The I-A classification flies into the teeth of the evidence. Such classification is a dishonest one, making it unlawful.—*Johnson v. United States*, 126 F. 2d 242, 247 (8th Cir.).

The case of *Estep* v. *United States*, 327 U. S. 114, held that if there was no basis in fact for the classification there must be a conclusion reached that the action of the board was in excess of its jurisdiction. This Court said that judges may not question an erroneous decision if the evidence must be weighed. There must be contradiction in the evidence or an impeachment of the registrant before there is a question of weighing the evidence. A board is the judge of a registrant's credibility. If it fails to appear in the file that the board questioned a registrant's integrity or truthfulness, it must be assumed that the claims were judged on the basis of accepting the facts stated by him as true. We do not have here

a case where the board refused to accept the testimony of the registrant as true. The question is whether the undisputed evidence establishes no basis in fact for the classification or, better stated, whether there is basis in fact for the denial of the claim for the exempt ministerial classification.

There is no basis in fact for the denial of the ministerial claim when there is no contradictory evidence in the file. *United States v. Graham*, 109 F. Supp. 377 (D. C. Ky. W. D. 1952), supports this view. The National Selective Service Appeal Board gave Graham Class I-A notwithstanding the I-O classification given by the district appeal board. Graham made the claim for exemption as a minister of religion. The court said:

> "Notwithstanding this hearing and the recommendation, the National Selective Service Appeal Board, on February 18, 1952, classified defendant as I-A and, pursuant to that classification, he was ordered to report for physical examination and, having been found physically fit for military service, was ordered inducted. Defendant reported for induction but refused to step forward in the ceremony for final induction."

In spite of the determination made by the National Selective Service Appeal Board, the court there accepted the same argument here made by Dickinson and entered a judgment of acquittal because, as the court stated—

> "Nothing appearing to contradict or impeach the verity of his claim as a conscientious objector and as a minister, it is adjudged by this Court that the classification of the defendant in I-A is without any factual foundation."—*United States v. Graham*, 109 F. Supp. 377.

See also *Arpaia* v. *Alexander*, 68 F. Supp. 820 (D. C.

Conn.). There Arpaia, a full-time minister of Jehovah's witnesses, was released from custody under a writ of habeas corpus because the draft board unlawfully denied his ministerial exemption. The court said:

> "In the case at bar, evidence was presented to the Board by the petitioner by affidavit and letter purporting to substantiate his claim that he spent all, or practically all, of his time in organized evangelical work, carrying on the program of the society with which he was affiliated, a recognized religious group, that he had been trained for this work for years by his parents who engaged in similar work, and that he was recognized by the other members of the society as one who devoted his life to the carrying on of this work as a 'pioneer', and that he had no regular or extensive secular employment. If believed, the evidence submitted by the registrant would qualify him as a regular minister of religion under the administrative interpretation of the Act announced in the November 2, 1942, amendment to Opinion No. 14 of the Director of Selective Service. There is no evidence in the file to dispute these claims other than the registrant's youth (18) and the recent completion of his high school education." —*Arpaia* v. *Alexander*, 68 F. Supp. 820.

It should be remembered that the Selective Service Act of 1948 and the Universal Military Training and Service Act are to be construed more liberally to the registrant than was the 1940 act. The reasons for the rule to protect the registrant are well stated in the case of Ex parte *Fabiani*, 105 F. Supp. 139 (D. C. Pa. E. D.). It is not here contended that the Court is authorized to scrap the 'no basis in fact' rule stated in *Estep* v. *United States*, 327 U. S. 114. It does seem, however, that in applying the 'no basis

in fact' rule under the 1948 act, the Court should be more liberal to registrants than under the 1940 act. (See the reasons stated in Ex parte *Fabiani*, 105 F. Supp. 139, at pages 145-147.) The rule of liberal interpretation should authorize the Court to hold that, if there is no contradicting or impeaching evidence compelling a weighing of the evidence, it must be concluded that there is no basis in fact for the classification or the denial of the claim.

It should be kept in mind also that the court below places extensive reliance upon what it guessed the local board may have considered when Dickinson appeared before it. The classification of the local board is not drawn in question. That classification has been superseded by the determination of the National Selective Service Appeal Board. The court below so held. [132] If the local board determination has been obliterated and this Court has before it only the question of whether the determination by the National Selective Service Appeal Board is without basis in fact, then much, if not all, of the shadow boxing by the court below on what may have gone through the minds of the members of the local board is entirely immaterial.

The court below has built up a straw man in place of Dickinson and knocked it down by supposition and speculations as to what the draft board may have thought, when, as a matter of fact, there is no factual basis for the speculations of the court below. Also whatever may have been thought by the local board members in the exercise of their powers of observation on personal appearance goes out of the case completely by the final determination made by the National Selective Service Appeal.

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on a important question of law that ought to be determined by this Court. This holding should therefore warrant the granting of the writ of certiorari.

II.

The regulations require that the local board reduce to writing and place in the registrant's file all oral evidence submitted by him pertaining to his occupational status and classification.

> "... The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; ... Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file. ..."—Section 1623.1 (b); see also Section 1624.2 (b).
>
> "... If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts."—Section 1626.13 (a).

Section 1626.13 (a) of the regulations required the local board to "carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete." The local board disregarded the regulations and acted in complete defiance thereof, thus flouting the law and showing utter contempt for Dickinson's right under the regulations.

The regulations intend that the classification upon appeal shall be *de novo*. The board of appeal and the National Selective Service Appeal Board do not have

an opportunity to permit the registrant to appear before them personally; they are confined in their consideration to the record made in writing. If the local board did not comply with the regulations requiring it to make a full record of all the facts and evidence considered by it, the appeal agency of the Selective Service System would be entirely at the mercy of the local board. If a record was not made of all the facts and evidence which properly entered into the judgment of the local board, then the board of appeal would not be in as good position to pass on the case as was the local board. The regulations contemplate that the local board shall make a record of all the evidence considered by it so that the board of appeal shall be in equally as good a position to pass upon the classification of a registrant as the local board.

This is the precise question that was presented to this Court in the case of *Estep* v. *United States*, 150 F. 2d 768, 327 U. S. 114. However, in spite of the fact that the Court did not pass upon the merits of such defense, the two dissenting judges of the court of appeals exhaustively reviewed the law in this conection. Reference is made to their opinions.—150 F. 2d 768, 773-781 (3rd Cir.).

Since the board of appeal has the final say as to the classification to be accorded a registrant, it must be assumed that the authors of the act and regulations intended that the local board, in all cases where appeals were taken by the registrants, should perform a duty in behalf of the board of appeal very much like a master, referee or notary public taking a deposition. It is the function of the local board to gather all the evidence for consideration by the board of appeal or the National Selective Service Appeal Board, which appellate agencies pass on all questions involved. If it were otherwise, so that the local board could withhold evidence, written documentary or oral, from the registrant's file forwarded to the board of appeal, the local board would have unlimited powers

and arbitrary discretion to determine just what evidence the appellate agencies should or should not consider under Section 1623.1 of the regulations. Thus the authority of the appellate agencies could be circumscribed and their power sapped by whimsical actions of the local board.

The principle announced by the United States Court of Appeals for the Sixth Circuit in *Niznik* v. *United States*, 173 F. 2d 328, is not apropos. The distinction between the facts of that case and the facts of this case, warranting the rejection of the principle announced, is that the papers in the draft board file in this case did not cover the oral evidence given upon the occasion of Dickinson's personal appearance. He gave new and additional testimony over and above the evidence appearing in the written parts of his file in reference to (1) his quitting secular work, (2) his having a congregation and presiding over it, (3) his full-time ministry, (4) his devoting only five hours per week to secular work, (5) his training for the ministry, (6) his pursuit of the ministry as his vocation, and (7) other factors and issues not involved in the written material.

The new and additional evidence offered by Dickinson upon the hearing of September 7, 1950, which was not in the written parts of the file and which was not reduced to writing as required by the regulations, is here briefly summarized. He said he was a full-time ordained minister of the gospel, that he was sincere, that he had a congregation of persons whom he served as a minister, that he had dedicated his life to Almighty God, and that in accordance with his commission and ordination by the Almighty, as stated at Isaiah 61:1-3, he had entered into a covenant or agreement to do the will of Jehovah God by thus taking active part in preaching this gospel of the Kingdom in all the world for a witness unto all nations before the end of this world comes. (Matt. 24:14) He also stated that, as a minister, he helped in giving spritual aid and comfort to people of good-will by calling back on those interested

persons and endeavoring to start home Bible studies with them, for their spritual enlightenment and blessing in the truth.

In *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir.), it was held that when new information was submitted it was the duty of the local board to reduce to writing all new information submitted by the registrant. In that case the court reversed and remanded the case for a new trial. This apparently was because the court was of the opinion that the conflict between the testimony of the defendant and the clerk of what actually took place at the local board presented an issue of fact which made that case one strictly for the jury.

But the principle established in the *Zieber* decision warrants the entry of a judgment of acquittal here because the facts in reference to what transpired before the local board are undisputed. This is supported by the decision of Judge McVicar, in *United States* v. *Garvin*, 71 F. Supp. 545 (D. C. Pa. W. D.). Among other things the court said:

> "Defendant, David Wilfred Garvin, Jr., was indicted in this Court for knowingly failing to submit to induction into the Armed Forces of the United States, October 7, 1946 as required under the Selective Training and Service Act of 1940, as amended. To this charge he pleaded 'Not Guilty'.
>
> . . .
>
> "The evidence discloses that the defendant on two or more hearings before the Local Board, gave oral evidence at length relating to his status as a minister of religion. This evidence was considered by the Local Board in making its classification as appears from the uncontradicted evidence of the Chairman of the Board. Not any of the oral evidence taken by the Local Board, or a summary thereof, was sent to the Appeal Board. The Board of Appeal, therefore, acted

upon the classification of the defendant without having all the evidence before it, which was received and considered by the Local Board in making its classification of the defendant. The result is that defendant did not have a fair hearing and he was denied due process of law.

"The foregoing opinion was written but not filed prior to the decision of the Third Circuit Court of Appeals handed down April 28, 1947, in the case of *United States* v. *Zieber, Jr.* . . .

"In the above case there were 'disputed fundamental questions of fact, relating to the testimony which Zieber stated he offered to the Local Board. In the present case there were no disputed questions of fact. The uncontradicted testimony of the defendant and of the Chairman of the Local Board was to the effect that Garvin did testify orally before the Local Board; that said testimony was considered by the Local Board; that it, nor a summary thereof, was not reduced to writing and filed and hence was not sent to the Board of Appeal for its consideration."

Therefore the judgment below should be reversed and the indictment ordered discharged because the action of the local board in failing to comply with the regulations requiring a reduction of the evidence received by it to writing was contrary to the regulations which made the order "lawless and beyond its jurisdiction".—*Estep* v. *United States*, 327 U. S. 114, 121; *United States* v. *Zieber*, 161 F. 2d 90, 93 (3rd Cir.).

The statement is made by the court below [130-131] that Mrs. Brock, clerk of the local board, disputed the testimony of Dickinson that he gave new and additional testimony. This statement by the Government is unfounded. It finds no support in the record. The footnote on page eight of the Government's brief filed in the court below proves the

contrary. It shows that the clerk was called by the Government as its witness and that she was not questioned on this point. The failure of the Government to question the clerk on this point or develop contradicting testimony by her leaves the case with a presumption that her testimony, if given, would have sustained the testimony of Dickinson rather than contradict it.

The record in this case is in the same shape on this point as was the record in the second *Niznik* appeal. On the first appeal the judgment was reversed to give the Government an opportunity on a new trial to call the draft officials. On the second trial the draft board members failed to contradict the testimony of the defendants. The court on the second appeal reversed the conviction and dismissed the indictment because the uncontradicted testimony of the appellants established a violation of procedural due process by the local board.—See *Niznik* v. *United States*, 184 F. 2d 972 (6th Cir.) Compare *Niznik* v. *United States*, 173 F. 2d 328 (6th Cir.)

The fact that the National Selective Service Appeal Board had, as stated by the court below, [132] a letter from Dickinson in his file giving a memorandum of the oral evidence to it does not cure the omission. It should be remembered that, while the omission did not prejudice Dickinson before the National Selective Service Appeal Board, it did harm him before the district appeal board. We cannot speculate on whether or not the omission to make the memorandum harmed Dickinson before the district appeal board. Judge Kaufman in *United States* v. *Romano*, 103 F. Supp. 597 (D. C. N. Y. S. D. 1952), said:

> "I do not intend to lose myself in conjectures of what might have happened had defendant had

> his post-classification hearing for, indeed, this would be out of the realm of reasonableness. It is sufficient to the disposition of the case before me that I find as a matter of law that defendant was deprived of the right which belongs to every citizen, due process of law."

It is respectfully submitted that the fact that the National Selective Service Appeal Board had a complete record before it and that it made a *de novo* classification did not cure the violation of procedural due process by the local board which injured Dickinson before the district appeal board.

There is absolutely no dispute in the evidence as to what took place before the local board on the occasion that Dickinson appeared before it. Therefore the evidence is undisputed that he offered "new information". The evidence is further undisputed that the local board failed to reduce to writing this "new information" and send it to the district appeal board. There being undisputed evidence showing that there was a violation of the regulations by the local board, it was the duty of the court below to find that the order supporting the indictment was lawless and void.

It is respectfully submitted that the holding of the court below on this phase of the problem is a ruling on an important question of law that ought to be determined by this Court. The holding of the court below directly conflicts with the decisions in *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.), and *United States* v. *Garvin,* 71 F. Supp. 545 (D. C. Pa. W. D.) Thi. holding should therefore warrant the granting of the writ of certiorari.

Conclusion

For the reasons stated, it is submitted that this petition for writ of certiorari should be granted.

Respectfully,

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